Tentative Rulings for November 30, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

14CECG01472 ***Gill vs. Fresno Community Hospital and Medical Center*** **(Dept. 402)**

16CECG00811 ***Melvin v. Hudson et al.*** **(Dept. 502)**

15CECG02527 ***People of the State of California, Dept. of Transportation v. Ray Roeder*** **(Dept. 502)**

15CECG02528 ***People of the State of California, Dept. of Transportation v. Ray Roeder*** **(Dept. 502)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

15CECG03896 ***Robert Chaplain v. BNSF Railway Company, et al.*** **is continued to Thursday, December 15, 2016, at 3:30 p.m., in Department 402.**

14CECG00069 ***Timothy Sailors v. City of Fresno*** **is continued to Wednesday, February 1, 2017 at 3:30 p.m. in Department 503.**

15CECG01448 ***2010-1 CRE Venture LLC v. Linmar-Shaw, LLC*** **is continued to Wednesday, December 28, 2016 at 3:30 p.m. in Department 502.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(28) **Tentative Ruling**

Re: ***Jackson v. The McCaffery Group, Inc., et al.***

Case No. 13CECG01676

Hearing Date: November 30, 2016 (Dept. 402)

Motion: By Plaintiff for reconsideration.

Tentative Ruling:

To deny the motion for reconsideration.

On the Court's own motion, the court reconsiders the original ruling and grants relief from the dismissal entered on March 15, 2016. The Court therefore orders the dismissal set aside.

The Court hereby schedules an Order to Show Cause re: Dismissal pursuant to Code of Civil Procedure §§583.210 and 583.250 for Thursday, April 13, 2017 at 3:30 p.m. in Department 402 of this Court.

Explanation:

Motion for Reconsideration

Code of Civil Procedure Section 1008, subdivision (a) states, in pertinent part, as follows:

> When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown.

A party seeking reconsideration of a prior ruling must show that "(1) evidence of new or different facts exist, and (2) the party has a satisfactory explanation for failing to

produce such evidence at an earlier time." (*Kalivas v. Barry Controls Corp.* (1996) 49 Cal.App.4th 1152, 1160-61.)

Although Plaintiffs do not specifically state the "new or different facts" upon which they base their motion, the grounds for the motion are, first, the fact that defendants have never been served, and, second, that the name on the proof of service of the January 15, 2016 Order to Show Cause is not a name associated with this case. However, neither of these are "new" facts or law, and there is no explanation for either case as to why Plaintiffs failed to produce these items prior to this motion. Indeed, the basis for the Court's ruling was posted to the Court's website in accordance with local rules. Furthermore, the purported error in service would likely have been evident to Plaintiffs prior to the hearing, since it appears on the Court's website.

Therefore, the motion for reconsideration is denied.

Court's Own Motion

Nevertheless, the Court can, on its own motion, reconsider its prior order. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1107.)

Although not cited by the moving party, pursuant to California Code of Civil Procedure §1014, "Where a defendant has not appeared, service of notice or papers need not be made upon the defendant." Thus, even though Plaintiffs did not attend the hearing, it appears that the motion did not have to be served on the non-appearing, non-served defendants.

Therefore, the Court can consider the original motion on the merits.

Merits of the Prior Motion for Relief from Dismissal

Code of Civil Procedure §473, subdivision (b) states, in pertinent part:

> The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. . . . Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties.

Plaintiffs began their motion relying on the discretionary grounds of the first part of subdivision (b).

Generally speaking, this is allowed where there is a showing of "excusable neglect," as Plaintiffs are arguing here. In determining "excusable neglect" for an attorney, "the court inquires whether a 'reasonably prudent person under the same or similar circumstances' might have made the same error." (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258 (emphasis in original).) Plaintiffs are correct that an unintentional failure to appear at a hearing has been found to constitute excusable neglect. (*People v. North River Insurance Co.* (2011) 200 Cal.App.4th 712, 718.) However, in *North River Insurance Company*, the neglect was excusable because the relevant papers were allegedly never received despite a request. (*Id.* at 716.) Here, it appears that the fault, such as it is, lies entirely with a failure to properly calendar a hearing. This probably constitutes "excusable neglect" under the circumstances.

Regardless of whether Plaintiffs qualify for discretionary relief, they almost certainly qualify for mandatory relief.

The application is made within six months after entry of judgment (dismissal entered March 15, 2016, motion filed on September 2, 2016) and contains an attorney affidavit of fault attesting to the neglect. (Code Civ.Proc. §473, subd.(b).)

Therefore, whether under mandatory or discretionary relief, Plaintiffs have demonstrated a basis for relief under Code of Civil Procedure section 473.

The Court also schedules a hearing on an Order to Show Cause re: dismissal pursuant to Code of Civil Procedure §§583.210 and 583.250 for Thursday, April 13, 2017 at 3:30 p.m. in Department 402.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 11/29/16
(Judge's initials) (Date)

Tentative Rulings for Department 403

(20) **Tentative Ruling**

Re: ***Santos et al. v. Pacific Gas and Electric Company, et al.***, Superior Court Case No. 15CECG01642

Hearing Date: **November 30, 2016 (Dept. 403)**

Motion: Motion for Leave to File First Amended Cross-Complaint

Tentative Ruling:

To grant leave to amend. (Code Civ. Proc. § 473.) Moving parties shall file the proposed First Amended Cross-Complaint within 10 days of service of the order by the clerk.

Explanation:

"The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading ... " (Code Civ. Proc. § 473(a)(1) (emphasis added).) The court's discretion will usually be exercised liberally to permit amendment of the pleadings. (See *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939; *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596; *Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428.) Moving parties have substantially complied with Cal. Rules of Court, Rule 3.1324, and there is no indication that prejudice will result to any other party.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 11/28/16
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Pace et al. v. Norton et al.***
Superior Court Case No. 15 CECG 02212

Hearing Date: November 30, 2016 **(Dept. 403)**

Motion: Demurrer to the verified Second Amended Complaint by Defendant Norton

Tentative Ruling:

To strike the Second Amended Complaint sua sponte pursuant to CCP § 436 with leave to amend. The general demurrers are rendered moot. An amended pleading in strict conformity with the ruling is to be filed within 15 days of notice of the ruling. Notice runs from the date that the Minute Order is placed in the mail. [CCP § 1013] Counsel is advised to "start fresh." No boldface is needed. Finally, the parties are asked to consider the appointment of a referee pursuant to CCP § 638.

Explanation:

Background

Plaintiffs Milton Pace and H&B Holdings, LTD. along with Defendants Gary Norton and St. Jon Real Estate are members of Defendant Sustainable Ag Farming Enterprises, LLC aka S.A.F.E. S.A.F.E. owns the "Gilkey Ranch" consisting of 940 acres of farm land in Fresno County. Plaintiff L&P Farms provides farming services to S.A.F.E. A dispute arose between Pace and Norton over the management of the Ranch.

On July 15, 2015, a complaint was filed seeking inter alia involuntary dissolution of S.A.F.E. A First Amended Complaint was filed. In ruling on the demurrer to the First Amended Complaint, the Court struck the pleading sua sponte with leave to amend. On February 16, 2016, a verified Second Amended Complaint was filed.

On March 30, 2016, Plaintiffs filed a notice of conditional settlement. The trial date of April 18, 2016 was vacated as a result. On August 16, 2016, Plaintiffs filed a motion seeking relief from settlement. Defendant Norton filed a statement of non-opposition. On September 14, 2016, the motion was granted and the case was restored to the civil active list.

On October 21, 2016, Defendant Norton filed a general demurrer to the first and second causes of action of the verified Second Amended Complaint. Defendant submits inter alia that first cause of action for breach of fiduciary duty fails to plead sufficient facts to overcome the "business judgment rule." As for the second cause of action for breach of oral contract, Defendant argues that it is "time-barred." Opposition and a reply were filed.

Law Re: Limited Liability Companies

Derivative Action

A derivative action is an action by a member to enforce a right of the *LLC*—i.e., to redress actual or threatened harm to the *LLC*. Any recovery received in the action belongs to the *LLC* and not to the derivative plaintiff. [See Corps.C. § 17709.02(a) (action "in right of" LLC); see *PacLink Communications Int'l, Inc. v. Sup.Ct. (Yeung)* (2001) 90 Cal.App.4th 958, 963-966]

To bring a derivative action, the plaintiff must have been a member of record (or beneficiary) at the time of the transaction, or any part of the transaction, that gave rise to the action. (But this requirement may be satisfied where plaintiff's status as a member devolved upon plaintiff by operation of law from a member who was a member at the time of the transaction or any part of the transaction—e.g., plaintiff may be the legal representative of a deceased person who was a member at the time of the transaction.) [Corps.C. § 17709.02(a)(1)]

Before bringing a derivative action, plaintiff must either demand that the managers bring the action that plaintiff desires or allege the reasons for not making the demand ("demand futility"). Plaintiff must inform the LLC or the managers **in writing** of the "ultimate facts of each cause of action against each defendant"; or, alternatively, plaintiff must give the LLC or the managers a copy of the proposed complaint. (To avoid disputes concerning whether plaintiff has adequately informed the LLC of the ultimate facts of each cause of action against each defendant, the customary practice is for derivative plaintiffs to provide the LLC with a draft of the complaint they intend to file.) [Corps.C. § 17709.02(a)(2)] A derivative plaintiff must allege **"with particularity"** plaintiff's efforts "to secure from the managers the action that plaintiff desires or the reasons for not making that effort." [Corps.C. § 17709.02(a)(2)]

Direct Action

Although California Revised Uniform Limited Liability Company Act (CRULLCA) does not expressly so state, a member may bring a direct action for injury to his or her interest **as a *member***. In the event a member has both direct and derivative claims, he or she may maintain both a direct action and a derivative action. [*Denevi v. LGCC* (2004) 121 Cal.App.4th 1211, 1221-1222; see *PacLink Communications Int'l, Inc. v. Sup.Ct. (Yeung)* (2001) 90 Cal.App.4th 958, 963-966—LLC members could not bring direct action for harm resulting from fraudulent sale of LLC assets because harm was to LLC and not to members directly (harm was derivative in nature)]

Merits

Business Judgment Rule

According to *1 Cal. Prac. Guide Pass--Through Entities Ch. 5 Limited Partnership Section C. "Partners' Rights, Duties and Liabilities"*:

> The business judgment rule, as adapted from corporate law, is a judicial policy of deference to the business judgment of directors in the exercise of their broad discretion in making decisions affecting the corporation's business. The rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith. The business judgment rule does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest. [See *Everest Investors 8 v. McNeil Partners* (2003) 114 Cal.App.4th 411, 429-430]
>
> The rule generally arises in the context of litigation by shareholders against a corporation, and provides a defense to claims of director malfeasance. The general partners in a *limited* partnership with many limited partners are more analogous to directors of a corporation than to general partners of a closely-held *general* partnership, which tends to lack the inherent centralized management of limited partnerships. It would appear that the business judgment rule would thus be more appropriately applied to general partners in *widely-held limited partnerships* than to general partners of a general partnership.

Notably, the Court's research found nothing that applies this defense to a *member managed limited liability company*. Neither party has cited applicable authority in this context. Defendant's citation to *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020 is not on point. In that case, a creditor sued the board of directors of Pluris, Inc. Accordingly, the business judgment defense of an LLC was not an issue.

Second Amended Complaint in General

On January 21, 2016, the Court struck the First Amended Complaint sua sponte with leave to amend on the grounds that it was poorly pleaded. Despite the guidance offered by the Court, the Second Amended Complaint differs little from the First Amended Complaint. The operative pleading consists of **48 paragraphs** of history and background complete with multiple footnotes! Notably, the first cause of action is not set forth until **paragraph 57.** To reiterate, a complaint must contain "a statement of the facts constituting the cause of action, in ordinary and **concise** language." [CCP § 425.10] The "facts" to be pleaded are those upon which liability depends—i.e., "the facts constituting the cause of action." These are commonly referred to as "ultimate facts." [See *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531 at 550] "(T)he complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." [*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872] In short, only the facts that support each of the elements of each cause of action are to be pleaded.

As stated in the previous ruling, each of **56** paragraphs preceding the first cause of action are incorporated by reference. Then, multiple paragraphs are incorporated haphazardly into the remaining three causes of action. See ¶¶ 57, 62, 68 and 81 of the Second Amended Complaint. This **still** results in a "chain letter" pleading causing ambiguity and redundancy. [See *International Billing Services, Inc. v. Emigh* (2000) 84

Cal.App.4th 1175, 1179; *Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 Cal.App.4th 598, 605] It is not the Court's responsibility to examine the "background" facts and "make the case" for the Plaintiffs.

As for the individual causes of action, it is completely unclear whether the first cause of action is derivative or direct. If it is derivative, the harm must be to the LLC. In addition, if it is derivative, the Plaintiffs must plead **"with particularity"** their efforts "to secure from the managers the action that plaintiff desires or the reasons for not making that effort." [Corps.C. § 17709.02(a)(2)]

On the other hand, if the action is direct, Plaintiffs have failed to allege the harm to their interests as members as opposed to the harm suffered by the LLC. See *PacLink Communications Int'l, Inc. v. Sup.Ct. (Yeung), supra.* Further, as argued by the Defendant, a common law cause of action of action for breach of fiduciary duty does not apply. See Corp. Code § 17704.09.

As for the second cause of action alleging breach of contract, it appears to be duplicative of common count for "open book account." See ¶¶ 64-67 and 82. However, the second and the fourth causes of action is brought against the LLC. Yet, the demurrer is brought by Defendant Norton alone. See Demurrer at pages 1 and 2. Accordingly, he lacks standing to demur to the second cause of action. Finally, the third cause of action for dissolution cites to outdated sections of the Corporations Code. See ¶ 69. Therefore, the Second Amended Complaint will be stricken sua sponte pursuant to CCP § 436 with leave to amend.

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 11/29/16
(Judge's initials) (Date)

Tentative Rulings for Department 501

Tentative Rulings for Department 502

(30)

Tentative Ruling

Re: ***Aujaneek Moore v. Antonio Solorio***
Superior Court Case No. 15CECG03017

Hearing Date: Wednesday November 30, 2016 (**Dept. 502**)

Motion: Defendants Antonio Solorio and Harris Farms' Motion to dismiss (terminating sanction)

Tentative Ruling:

To deny.

Explanation:

Disobeying a court order to provide discovery is a misuse of the discovery process. (Code Civ. Proc., § 2023.010.) And This Court may impose a terminating sanction for misuse of the discovery process. (Code Civ. Proc., § 2023.030.) But before imposing a "terminating" sanction, courts should usually grant lesser sanctions: e.g., orders *staying* the action until plaintiff complies, or orders declaring matters as *admitted* or *established* if answers are not received by a specified date, often accompanied with costs and fees to the moving party. It is only when a party *persists* in disobeying the court's orders that the ultimate ("doomsday") sanctions of dismissing the action or entering default judgment, etc. are justified. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796; *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262; *Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377.) This policy is only disregarded "in egregious cases." (*New Albertsons, Inc. v. Sup.Ct.* (2008) 168 Cal.App.4th 1403, 1434; see also *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 490-491 (disapproved on other grounds in *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478); *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 497.) Additionally, numerous cases hold that severe sanctions for failure to comply with a court order are allowed only where the failure was willful. (*R.S. Creative, supra,* 75 Cal.App.4th at p. 495; *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545; *Biles v. Exxon Mobil Corp.* (2004) 124 Cal.App.4th 1315, 1327.)

Here, Plaintiffs have not complied with *one* motion to compel. (Tentative Ruling, adopted 9/7/16.) Monetary sanctions were ordered, but there are *still* other remedies available (i.e. staying orders; issue sanctions; evidence sanctions). Further, there is little evidence of willful failure which might justify a terminating sanction. Instability, grief and telephone issues, *not* bad faith, prevented Plaintiffs from being able to comply sooner. (Opposition, filed 11/15/16 ¶¶ 9-12.) Also, since reestablishing communication with their Attorney, Plaintiffs have already served answers to form interrogatories. (Opposition, filed 11/15/16 Ex. 2.) And although answers were incomplete and objectionable (Reply

filed 11/17/16), these missteps are not egregious enough to justify termination where there less severe options still available.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 11/28/16
(Judge's initials) (Date)

(30)

Tentative Ruling

Re: ***U.S. Bank v. HSBC Mortgage***
Superior Court Case No. 15CECG03358

Hearing Date: Wednesday November 30, 2016 (**Dept. 502**)

Motion: Default Hearing

Tentative Ruling:

To **Grant as to equitable subrogation in the amount of $215,464.65** *if Plaintiff submits a proposed judgment.*

Explanation:

1. California Rules of Court, rule: 3.1800
An application for default judgment must include a proposed form of judgment. (Cal. Rules of Court, rule 3.1800.)

Here, Plaintiff has not provided a proposed judgment. Plaintiff is ordered to prepare and submit a proposed judgment prior to or on the day of the hearing: Wednesday November 30, 2016.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 11/28/16
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Niesei Farmers League v. California Labor and Workforce Development Agency.***

Case No. 16CECG02107

Hearing Date: November 30, 2016 (Dept. 502)

Motion: By Defendants demurring to the Amended Complaint in its entirety.

Tentative Ruling:

To sustain the demurrer. Whether leave to amend is granted will depend upon whether an as applied challenge to the statute can be alleged on these facts. The parties are ordered to file briefs addressing this issue on or before December 14, 2016 and the hearing is continued to December 21, 2016 at 3:30 p.m. in Dept. 502.

Explanation:

A general demurrer admits the truth of all material allegations and a Court will "give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context." (*People ex re. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300.) The standard of pleading is very liberal and a plaintiff need only plead "ultimate facts." (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) However, a plaintiff must still plead facts giving some indication of the nature, source, and extent of the cause of action. (*Semole v. Sansoucie* (1972) 28 Cal.App.3d 714, 719.)

Demurrer to the Second, Third, and Fourth Causes of Action

Defendants demur to the causes of action for violation of Constitutional Due Process in the Second, Third, and Fourth causes of action, for vagueness, arbitrary deprivation of property and lack of fair notice, respectively.

As an initial matter, Plaintiffs contend that Defendants are applying the incorrect legal standard, insofar as they argue that the Defendants appear to be utilizing "summary judgment" procedures. Plaintiffs misconstrue the test.

"The interpretation of a statute and the determination of its constitutionality are questions of law." (*Valov v. Department of Motor Vehicles* (2005) 132 Cal.App.4th 1113, 1120, 34 Cal.Rptr.3d 174.) As such, the only "facts" that are relevant is the language of the statute and any legal guidance provided by legislative history or other legal authority.

A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084, (*Tobe*).) "If feasible within bounds set by their words and purpose, statutes should be construed to preserve their constitutionality." (*Mason v. Office of Admin. Hearings* (2001) 89 Cal.App.4th 1119, 1126–1127, fn. omitted (*Mason*).) "The analysis begins with the strong presumption that legislative enactments must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. [(*Tobe, supra,* 9 Cal.4th at p. 1107 (internal citations and quotations omitted).)

In *Tobe, supra,* 9 Cal.4th at page 1084, 40 Cal.Rptr.2d 402, 892 P.2d 1145, the Supreme Court articulated the following test for substantiating a facial constitutional challenge to a statute: "To support a determination of facial unconstitutionality, voiding the statute as a whole, [a party] cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute .... Rather, [he or she] must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions. [Citations.]" (*See also Samples v. Brown* (2007) 146 Cal. App. 4th 787, 799- 804 (internal quotations omitted).)

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Civil as well as criminal statutes must be sufficiently clear to provide a standard or guide against which conduct can be uniformly judged by courts and administrative agencies. The vagueness doctrine serves two primary functions. First, it affords citizens reasonable notice of what is prohibited. Vague laws may trap the innocent by not providing fair warning. Second, this doctrine requires that a legislature establish minimal guidelines to govern law enforcement. [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.
>
> "Two principles identified by our Supreme Court and endorsed by the United States Supreme Court guide our analysis. First, the challenged statutory language must be evaluated 'in a specific context.' A contextual application of otherwise unqualified legal language may supply the clue to a law's meaning, giving facially standardless language a constitutionally sufficient concreteness. A court errs by characterizing statutory language as vague without considering that language in context which includes, in particular, the purpose of the statute at issue. Second, the Constitution requires only a reasonable degree of certainty or specificity. A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language."

(*Samples, supra,* 146 Cal. App. 4th at 800-801 (internal citations and quotations omitted.), *see also People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117.).)

Plaintiffs argue that the standard is simply whether "a lay person of common intelligence can understand the law, not a lawyer or judge." (*Kasler v. Lockyer* (2000) 23

Cal.4th 472, 498-99.) This is an oversimplification. As noted above, the standard is more nuanced than that.

Moreover, the standards of certainty for vagueness are lessened for a civil statute than a criminal statute. (*Ford Dealers Ass'n. v. DMV* (1982) 32 Cal.3d 347, 366.)

California Labor Code §226.2 states, in pertinent part:

> Notwithstanding any other statute or regulation, the employer and any other person shall have an affirmative defense to any claim or cause of action for recovery of wages, damages, liquidated damages, statutory penalties, or civil penalties, including liquidated damages pursuant to Section 1194.2, statutory penalties pursuant to Section 203, premium pay pursuant to Section 226.7, and actual damages or liquidated damages pursuant to subdivision (e) of Section 226, based solely on the employer's failure to timely pay the employee the compensation due for rest and recovery periods and other nonproductive time for time periods prior to and including December 31, 2015, if, by no later than December 15, 2016, an employer complies with all of the following:
>
> > (1) The employer makes payments to each of its employees, except as specified in paragraph (2), for previously uncompensated or undercompensated rest and recovery periods and other nonproductive time from July 1, 2012, to December 31, 2015, inclusive, using one of the formulas specified in subparagraph (A) or (B):
> >
> > > (A) The employer determines and pays the actual sums due together with accrued interest calculated in accordance with subdivision (c) of Section 98.1.
> > >
> > > (B) The employer pays each employee an amount equal to 4 percent of that employee's gross earnings in pay periods in which any work was performed on a piece-rate basis from July 1, 2012, to December 31, 2015, inclusive, less amounts already paid to that employee, separate from piece-rate compensation, for rest and recovery periods and other nonproductive time during the same time, provided that the amount by which the payment to each employee may be reduced for amounts already paid for other nonproductive time shall not exceed 1 percent of the employee's gross earnings during the same time.

Plaintiff specifically contends that the phrases "other nonproductive time," and "actual sums due" are unconstitutionally vague.

Plaintiff's argument is that its members do not know whether to take advantage of the affirmative defense provided by the statute because its members do not understand the phrases "other nonproductive time," and/or "actual sums due."

The parties' disputes center on the proper interpretation to give *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36 (*Gonzalez*) and *Bluford v. Safeway Stores, Inc.* (2013) 216 Cal.App.4th 864 (*Bluford*).

In turn, *Gonzalez* and *Bluford* relied on *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, which held, over a decade ago, that "[w]hile the averaging method utilized by the federal courts to assess whether a minimum wage violation has occurred may be appropriate when considered in light of federal public policy, it does not advance the policies underlying California's minimum wage law and regulations. California's labor statutes reflect a strong public policy in favor of full payment of wages for all hours worked. We conclude, therefore, that the FLSA model of averaging all hours worked "in any work week" to compute an employer's minimum wage obligation under California law is inappropriate. The minimum wage standard applies to each hour worked by respondents for which they were not paid."

Bluford and *Gonzalez* merely extended this explicitly to piece work compensation. *Gonzalez*, likewise, was based in part on "Wage Order No. 4" which provided that every employer shall pay to each employee "for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise" and was itself adopted in 2001. (*Gonzalez, supra,* 214 Cal.App.4th at 45; 8 CCR §11040, subd. (4)(B).) Arguably, Plaintiff's members should have been on notice that their method of averaging the compensation was legally suspect as of 2005 and that, therefore, at least rest periods were subject to minimum wage standards. As a result, the "actual sums due" would encompass compensation for these rest period as of 2005 and would, by terms of the statute, include the time discussed in *Bluford* and *Gonzalez*.

The precise phrase "non-productive time" does not appear in either *Bluford* or *Gonzalez.* However, it is defined in the statute as "time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis." (Cal.Lab. §226.2 (first paragraph).)

Moreover, *Gonzalez* dealt with compensation both for rest breaks and for "time spent by a piece-rate employee waiting for vehicles to repair and performing non-piece-rate tasks directed by their employer." (*Gonzalez, supra,* 215 Cal.App.4th at 54.) Inferentially, therefore, *Gonzalez* would apply to the time "not directly related to the activity," which is to say "time spent...waiting" and "non-piece-rate tasks directed by their employer." Therefore, again, the language is discernable of meaning both in terms of "plain English" and in the context of the statutory scheme and applicable case law.

Thus, in this legal context, "actual sums due" and "non-productive time," are defined with "reasonable specificity" and are not vague and ambiguous as a matter of law.

Therefore, the demurrer to the second, third, and fourth causes of action is sustained.

Demurrer to the Fourth, Fifth, and Sixth Causes of Action

The Fourth cause of action alleges a violation of due process insofar as section 226.2 can be interpreted as having retroactive application. The Sixth Cause of Action alleges a Takings Clause violation and the Seventh Cause of Action alleges a Contract Clause violation.

Defendants argue that each of these claims is essentially based on the premise that Section 226.2 impermissibly has retroactive effect. (*Usery v. Turner Elkhorn Mining Co.* (1976) 428 U.S. 1, 15 (burden to show due process violation is to establish retroactive legislation is arbitrary and irrational); *Eastern Enterprises v. Apfel* (1998) 524 U.S. 498, 528-29 (there may be a cause of action for a Takings Clause violation when legislation imposes severe retroactive liability); *General Motors Corp. v. Romein* (1992) 503 U.S. 181, 186 (violation of Contract Clause is to establish that legislation substantially impaired an existing contractual relationship). Plaintiffs do not appear to challenge this, merely that, as a complaint, Defendants must accept Plaintiffs' allegations. However, as noted above, the Complaint poses a question of law that can be resolved on a demurrer.

A fair reading of the statute indicates, as Defendants assert, that there is no retroactive enforcement anticipated in the law as written. Section 226.2 merely provides an affirmative defense for employers who follow the specified procedures and pay amounts already owed for piece-work prior to the start date. There is nothing in the Section that revises how the amounts owed for prior work is calculated. Plaintiffs point to various internal documents that purportedly direct staff with the Department of Labor Standards Enforcement to calculate sums retroactively. Even assuming Plaintiffs' view of these documents is correct, such evidence would likely be relevant in an as applied challenge, as opposed to the facial challenge brought here.

The statute *as written* does not appear to apply retroactively. Since it does not apply retroactively, then Plaintiff has not stated a cause of action for the Fourth, Fifth and Sixth causes of action. Therefore, the demurrer as to these causes of action is sustained.

The First and Eighth Causes of Action

The First Cause of Action is for Declaratory Relief and the Eighth cause of Action seeks an injunction. Each of these is based on the other grounds for relief. Since the demurrer has been sustained as to each of the other grounds for relief, the demurrer to these is sustained.

Furthermore, the First Cause of Action seeks a declaration that "*Bluford* and *Gonzalez* were wrongly decided or at least limited to their specific facts" and, therefore, an injunction "prohibiting Defendants from applying their interpretations of

Gonzalez [and] *Bluford* [] to calculating 'actual sums due' before 2016." (Amended Complt. Paras. 167, 172.) This is plainly beyond the power of the trial court to decide; such arguments are better directed at the Court of Appeal.

Leave to Amend

To the extent that the Amended Complaint seeks legal determinations that Section 226.2 is facially unconstitutional, the demurrer is sustained without leave to amend. However, the parties have not addressed whether the Amended Complaint could be interpreted in whole or in part as an "as applied" challenge to implementation of the statute. (*Samples, supra,* 146 Cal. App. 4th at 803-804 (an as applied claim is often how "perceived ambiguity problems with [a particular] standard should be resolved, i.e., in the context of a specific application to an actual factual situation.") The court therefore orders briefing on the issue as set forth above.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 11/29/16
(Judge's initials) (Date)

Tentative Rulings for Department 503

(29) **Tentative Ruling**

Re: ***Carolyn Brown v. Martha Vagt, et al.***
Court Case No. 16CECG00340

Hearing Date: November 30, 2016 (Dept. 503)

Motion: Vacate order deeming RFAs admitted or, in the alternative, order to withdraw admissions

Tentative Ruling:

To order Plaintiff's admissions to Defendant's request for admissions, set one, withdrawn. Plaintiff to provide complete, verified responses to Defendant's request for admissions, set one, within 5 days of the clerk's mailing of the minute order.

Explanation:

"[A] deemed admitted order establishes, by judicial fiat, that a nonresponding party has responded to the requests by admitting the truth of all matters contained therein." (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 979.)

A party may withdraw or amend an admission made in response to a request for admission only where leave of court has been granted after notice to all parties. (Code Civ. Proc. §2033.300(a).) Withdrawal or amendment is proper where the court finds that the admission was the result of mistake, inadvertence, or excusable neglect, and that the party requesting the admission will not be substantially prejudiced. (Id. at (b).) When ruling on a motion to withdraw an admission, the court must exercise its discretion in a manner that serves the ends of justice. (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1420.) "Because the law strongly favors trial and disposition on the merits, any doubts in applying section 2033.300 must be resolved in favor of the party seeking relief." (*Ibid*.)

In the case at bench, Plaintiff's counsel has filed a declaration attesting to his own "mistake, inadvertence and excusable neglect." (Decl. of Silvers, ¶¶ 3, 5, 6, 10, 13, 22-25, 28, 34.) The motion is unopposed, and it appears that Defendant had received Plaintiff's responses to the request prior to the hearing, but that the verification page was missing. There is thus no discernable prejudice to Defendant in allowing Plaintiff to withdraw her admissions, and permitting withdrawal will serve the ends of justice in this instance. Accordingly, Plaintiff's motion for an order withdrawing her admissions is granted. Plaintiff to provide complete, verified responses to Defendant's request for admissions, set one, within 5 days of the clerk's mailing of the minute order.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order

adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 11/29/16
(Judge's initials) (Date)

(6)

Tentative Ruling

Re:	***Knight v. Cumulus Media Inc.*** Superior Court Case No.: 16CECG02169
Hearing Date:	November 30, 2016 (**Dept. 503**)
Motion:	Demurrer to first amended complaint by Defendants Cumulus Radio Corp. and Blake Taylor

Tentative Ruling:

To overrule, with Defendants granted 10 days' leave to answer. The time in which the complaint can be answered will run from service by the clerk of the minute order.

Explanation:

The allegations that Defendants Cumulus Radio Corp. and Blake Taylor ("Defendants") told others that Plaintiff John Michael Knight plagiarized a news story leading to his dismissal at ¶17, along with the specific allegations of the cause of action, that Defendants told others, including but not limited to Patty Hixon, Sue Stoner, other employees of Cumulus Radio Corp. and potential employers, expressly or by implication that Plaintiff was dishonest, incompetent, that he violated his employment agreement, that he caused problems with other employees, that he performed his job poorly, and that he deserved to be terminated, at ¶52, is sufficient to allege a cause of action for defamation. (Judicial Council of Cal. Civ. Jury Instns. (June 2016 rev.) CACI No. 1704.)

When it appears that the defendant in a defamation action has superior knowledge of the facts, and the pleading gives notice of the issues sufficient to enable preparation of a defense, the pleading will be held certain enough to overrule a general demurrer. (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 458.) The general demurrer is thus overruled. (Code Civ. Proc., § 430.10, subd. (e).)

As for the special demurrer: "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.) Any uncertainty as to whether and what statements were written and which were oral can be cleared up via discovery. The special demurrer is thus overruled. (Code Civ. Proc., § 430.10, subd. (f).)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 11/29/16
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: **Calaveras Materials, Inc. v. Diablo Contractors, Inc., et al.**

Case No. 15CECG03129

Hearing Date: November 30, 2016 (Dept. 503)

Motion: By Defendant State of California, Department of Transportation ("Caltrans") for Order Discharging Stakeholder and for Related Orders.

Tentative Ruling:

To grant the motion; the Court shall issue the appropriate orders upon deposit of funds with the Court clerk.

Explanation:

[The Court notes that no opposition or objection appears in the Court's files.]

Defendant seeks to be discharged from the case upon the deposit of the moneys at issue in this case. (*Virtanen v. O'Connell* (2006) 140 Cal.App.4th 688, 698.) The effect of this would be to discharge plaintiff from further liability with respect to these sums, and to keep the fund in the court's custody until the rights of potential claimants of the moneys can be determined. (*Id.*)

Defendant has filed an affidavit supporting its right to an interpleader and has served the motion on the adverse claimants. (Code Civ.Proc. §§386, subd.(a); 386.5) There has been no objection and the papers appear to be in order, so the motion for discharge should be granted. (*See, e.g., City of Morgan Hill v. Brown* (1999) 71 Cal.App.4th 1114, 1127 (discharge proper where no objection is filed).) The Court will issue the appropriate orders upon notice of deposit of funds with the Court Clerk.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 11/29/16
(Judge's initials) (Date)